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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 529

FRED T. MACKEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (A. 47–55) is reported at 411 F. 2d 504. The opinion of the district court (A. 27–38) is unreported. The opinion of the court of appeals on direct review of petitioner's conviction is reported at 345 F. 2d 499 (C.A. 7), certiorari denied, 382 U.S. 824.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1969. The petition for a writ of certiorari was filed on August 29, 1969, and certiorari was granted on December 8, 1969. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution of an admitted gambler for evading payment of income taxes, the admission into evidence of his monthly wagering tax forms was error which may be collaterally attacked under 28 U.S.C. 2255.

2. Whether the rationale of *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, precludes the admission into evidence of wagering tax forms in an income tax evasion prosecution.

3. Whether the rationale of *Marchetti-Grosso* should be applied retroactively to convictions which had become final before the date of those decisions.

STATEMENT

In March 1963 petitioner was charged with five counts of income tax evasion for the years 1956 through 1960, by causing false returns to be prepared, in violation of 26 U.S.C. 7201. After a jury trial, he was convicted on all counts and sentenced to concurrent terms of imprisonment for five years and a $10,000 fine.

1. Proceeding under the net worth of proof,[1] the government showed that at the starting point, December 31, 1955, the apparent net worth of petitioner and his wife was $361,461.52, a figure substantially

[1] This method was approved in this Court's decisions in *Holland* v. *United States*, 348 U.S. 121; *Friedberg* v. *United States*, 348 U.S. 142; *Smith* v. *United States*, 348 U.S. 147; and *United States* v. *Calderon*, 348 U.S. 160, and is described in some detail in *Holland*, *supra*, 348 U.S. 121, 125.

greater than all of the income reported by them since 1929 (A.A. 1342–1363, 1422–1423).[2] The assets attributed to petitioner and his wife on that date included cash, government bonds, secured and unsecured loans receivable, real estate and stocks. Some of these items were not held in petitioner's name, but ownership was traced to him through proof that he had furnished the funds to purchase them (Govt. Exh. 800, A.A. 2103). The bulk of such traceable property consisted of loans and mortgages which petitioner had made to individuals through a corporation he controlled, Gibraltar Industrial Life Insurance Co. (A.A. 2128).[3] Other assets traced to petitioner had been purchased by relatives and friends with cash provided by petitioner. Title to real estate was often recorded in the name of petitioner's "nominee" (see, *e.g.*, A.A. 378, 421, 576).

For the tax years 1956 through 1960, petitioner and his wife filed returns reflecting taxable income totalling $143,339.24, upon which they paid income tax in the amount of $38,622.41 (A.A. 2153). The trial testimony and numerous exhibits disclosed that from 1956

[2] "A.A." refers to the four-volume appellant's appendix which was compiled along with a short appellee's appendix ("G.A.") when the case was on direct appeal, and which has been included as part of the record filed with the Clerk of this Court.

[3] Petitioner gained control of Gibraltar Industrial in 1947 and was chairman of its board during the years specified in the indictment (A.A. 499–501, 1572–1573). He installed his relatives as officers and managers of the company. Petitioner's sister, Mrs. Fanny Benford, served as treasurer and was made responsible for all of the company's funds, despite a limited formal education, no bookkeeping experience and a total unawareness of the most elementary accounting terminology (A.A. 1219–1221).

through 1960, petitioner acquired more than $1,000,000 in new assets, continually shielding his possessory interest by the use of nominees, particularly two new corporations he caused to be created, Gibraltar Mutual Life Insurance Company and M.W.E. & S. (originally M.W. & E.) Investment Company,[4] as well as Gibraltar Industrial.

Petitioner argued that the assets imputed to him actually belonged to the corporations. However, the federal income tax returns of Gibraltar Industrial, Gibraltar Mutual and M.W.E. & S. and the annual

[4] Gibraltar Mutual was organized by petitioner in 1954 with a $35,000 investment. Petitioner added $5,000 to that capital in 1959 and $13,000 in 1960 (A.A. 296–297, 299). The company's officers consisted of the five relatives of petitioner (who was chairman of the board) listed as officers of Gibraltar Industrial (G.A. 35–40). Mrs. Benford served as treasurer and office manager. The other company, M.W.E. & S., was organized prior to 1957 as a sole proprietorship and incorporated in that year (A.A. 1266). It purported to serve as an investment company, particularly for funds of the Gibraltar companies (A.A. 260–261, 1266–1267). All three corporations utilized the same office, and some of the same employees who collected premium income for the Gibraltar companies collected money for M.W.E. & S. (A.A. 368, 615–616, 862–863, 1057). There was evidence that transactions and funds of the insurance companies were sometimes commingled with those of petitioner and M.W.E. & S. (A.A. 346, 452–453, 795–796; G.A. 27). The Gibraltar Building, whose title was held in the name of Gibraltar Industrial and whose cost of construction was paid for by petitioner in cash, was reported each year as an asset of M.W.E. & S. (A.A. 311–315, 786–788, 794). Petitioner in 1958 created a fictitious $200,000 mortgage liability on the building (A.A. 358–359, 1341). The federal income tax returns of M.W.E. & S. (Govt. Exhs. 14, 15, 16) showed the value of the property as $300,000, and a reduction in the mortgage encumbrance to $160,000 by 1960 (A.A. 883, 885–887). The returns were prepared by an attorney from information provided by petitioner (A.A. 885–886).

reports submitted to the State of Indiana by the two insurance companies covering the period 1956–1960 indicated that Gibraltar Industrial operated at a loss amounting to more than $27,000 and never had gross income in excess of $64,000 in any one year. For the same period Gibraltar Mutual lost approximately $800 on a maximum annual gross income of about $43,000, and M.W.E. & S. had a total net income of $39,971.35 (Govt. Exhs. 14–16, 125–129, 140–144; A.A. 257–264, 277–278, 305–309). Moreover, the annual statements of the insurance companies, which were prepared from information furnished by petitioner or his relatives, did not list any securities or real estate as owned by the companies (A.A. 784–785, 802–803). Utilizing this and similar information, the government's proof established that petitioner's taxable income for the years 1956 through 1960 was $1,148,434.86, and that the correct amount of income tax was $777,959.48.[5]

[5] Under the government's proof, the amounts of taxable income and income tax liabilities reported on petitioner's returns for each of the years in question, compared with the correct amounts as proved at the trial, are as follows (Govt. Exhs. 9–13, 800–802; A.A. 2103–2153):

Taxable income

Year	Correct amount	Reported amount	Unreported income
1956	$209, 108. 95	$17, 315. 54	$191, 793. 41
1957	350, 681. 63	13, 452. 72	337, 228. 91
1958	378, 408. 95	33, 884. 68	344, 524. 27
1959	138, 157. 27	39, 593. 38	98, 563. 89
1960	72, 078. 06	39, 092. 92	32, 985. 14
Total	1, 148, 434. 86	143, 339. 24	1, 005, 095. 62

(Footnote continued on p. 6.)

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2. At the opening of the prosecution's case government counsel offered in evidence the income tax returns filed by petitioner for the calendar years 1949 through 1960 (Govt. Exhs. 1–13). With respect to the 1956–1960 returns (Govt. Exhs. 9–13), defense counsel objected to the admission of portions of Supplementary Schedule C forms ["Profit (or loss) from Business or Profession"] which identified certain income as having come from "policy" operations, on the ground that it would prejudice petitioner by showing a violation of State gambling laws (A.A. 224–227). The court reserved its ruling on this objection at that time (A.A. 227). Shortly thereafter, the discussion between the court and counsel turned to Government Exhibits 30–89, which comprised 60 monthly wagering excise tax returns (Form 730, App. 41–45) filed by petitioner for the five years covered by the indictment (A.A. 228–229). Defense counsel objected to their admission into evidence on the ground of inflammatory prejudice and because the information on the forms could be found on Schedule C forms accompanying the annual income tax returns (A.A. 230). The court determined that the wagering tax forms

Income tax

Year	Correct amount	Reported amount	Unreported tax
1956	$134, 508. 61	$3, 209. 08	$131, 299. 53
1957	255, 277. 42	2, 015. 45	253, 261. 97
1958	279, 213. 45	9, 353. 31	269, 860. 14
1959	77, 456. 38	12, 097. 89	65, 358. 49
1960	31, 503. 62	11, 946. 68	19, 556. 94
Total	777, 959. 48	38, 622. 41	739, 337. 07

would be admitted if the government could show that they contained matter not reported on the Schedule C forms (A.A. 231), and reserved ruling on their admission.

The first government witness, Frank J. Smith, stated that he was the accountant who had prepared the income tax returns signed by petitioner and filed for the period 1956–1960. His testimony consisted of a review of the matters reported on those returns, including the supplementary schedules. As part of his discussion, Mr. Smith identified the wording set forth on line A on one of the Schedule C forms supplementing the 1956 return (Govt. Exh. 9) as "Principal business activity colon policy operator" (A.A. 233). Defense counsel's objection to that identification on the grounds of prejudice and lack of foundation was overruled (A.A. 233–234). Mr. Smith testified that he had placed the description and amounts—which he had transposed from books furnished by petitioner—on the schedule. Similar recitations that petitioner had obtained income from the business of "policy operator" or "policy wheel" were noted on the Schedule C forms accompanying Government Exhibits 10 through 13, the returns for 1957 through 1960 (A.A. 248–250). In addition, Mr. Smith testified that he prepared wage and tax statement (W–2) forms for petitioner's employees, some of whom were carried as engaging in the policy business (A.A. 246). Over defense counsel's objection Government Exhibits 9–13 were admitted into evidence (A.A. 244, 256).

More than 60 witnesses had testified before any

further reference was made to petitioner's involvement in a gambling enterprise. The renewal of discussion on this matter came about during the testimony of petitioner's secretary, Laura McComb, after she had stated without objection that she knew Frank J. Smith and had furnished him the copies of Government Exhibits 52–89 (monthly wagering tax forms) which petitioner had retained, as well as a ledger she had kept containing information received from petitioner relating to those exhibits (A.A. 662). Following this testimony government counsel once more offered Government Exhibits 52–89 into evidence. A brief discussion was held between the court and counsel, resulting in the continued reservation of a ruling because the previously stated condition for admitting the monthly wagering tax forms—*i.e.*, that they be shown not to be merely cumulative of what was reported on the Schedule C forms of the income tax returns—had not been satisfied (A.A. 667–669).

The matter of admitting the wagering tax forms was not raised again until approximately 20 more witnesses had completed their testimony and the government called to the stand its final witness, Edward Harrington, an Internal Revenue Service technical adviser.[6] At the outset of his lengthy testimony Har-

[6] Shortly before Harrington's testimony, IRS Agent Kenneth Brunk testified without objection that in April 1960 he interviewed petitioner, at which time petitioner identified his occupation as a "policy operator," but on advice of counsel declined to answer any questions pertaining to his net worth. Evidently there was no discussion between them relating to the wagering tax forms whose admission into evidence is now being challenged (A.A. 1339–1342).

rington was asked to identify Government Exhibit 765, which he had prepared, showing a difference between the yearly totals of the "Gross amount of wagers," as reported on petitioner's monthly wagering tax forms, and the amounts reflected on the Schedule C forms as "Total receipts, less allowances, rebates and returns," for the years in question. Defense counsel objected to the exhibit as inflammatory, contending that petitioner was not on trial for any inaccuracy in the wagering tax forms (A.A. 1364–1365). However, since the totals of the amounts on the monthly wagering tax forms were not the same as the totals of the net receipts from policy operations as reported on the income tax schedules, the court determined that Government Exhibits 30–89, as well as 765, should be admitted into evidence (A.A. 1368–1370). The witness then proceeded to explain his computations for 1956, showing that the total of "[g]ross amount of wagers" reported on the monthly forms was $142,668.25; the expenses for petitioner's policy operations as reported on Schedule C were $19,662.93; and that the balance, $123,005.32, exceeded the net profit from gambling reported on Schedule C ($15,977.71) by $107,027.61 (A.A. 1371–1372). Harrington stated that Exhibit 765 contained similar computations for the remaining years listed in the indictment (A.A. 1372–1373). On cross-examination, the witness stated that he had no personal knowledge of petitioner's actual expenses in the policy business, and that the net difference for 1956 as reflected on Exhibit 765, $107,027.61, could not

have accounted for the entire adjusted gross income asserted by the government for that year ($209,108.95) (A.A. 1626, 1665–1668, 2152). The witness also acknowledged that he was aware that the income tax schedules had been prepared by an accountant, Mr. Smith (who had testified that the "Total Receipts" figures on the Schedule C forms represented gross wagers (on which the 10-percent excise tax is paid) minus payoffs) (A.A. 245, 1910).

At the conclusion of the prosecution's case, petitioner moved for an acquittal, citing as one of the reasons the court's admission of the wagering tax forms. Government counsel argued that they were admissible to show a likely source of omitted income (A.A. 1846–1848, 1853). Petitioner's motion was denied, and the defense rested. In closing argument government counsel "invited" the jury to review the documentary evidence, including the wagering tax forms (A.A. 1875). Defense counsel argued that the government had failed to produce any direct evidence of a source of income capable of producing assets in the amount alleged (A.A. 1886–1887). He pointed to evidence that petitioner had engaged in three occupations, including that of a policy operator, but asserted that petitioner was not on trial for violating the Indiana gambling laws; that no witnesses had testified regarding any improprieties in petitioner's reported earnings from the policy business; and that the only purpose served by such evidence was to prejudice his client (A.A. 1908–1910). In rebuttal, government counsel explained the meaning of Exhibit

765 and suggested that it showed a likely source for the undisclosed increase in petitioner's net worth (A.A. 1920–1921). Government counsel also suggested other sources, including unreported stock dividends, interest payments on loans, rental income and other receipts purported to be collected by M.W.E. & S. (A.A. 1921–1922).

In its closing charge the court instructed that neither the fact that petitioner had engaged in the policy business, nor the issue whether that occupation violated State law, should be considered in any manner whatsoever in determining whether he was guilty as charged in the indictment, and that the "sole question" to be resolved by the jury was set forth in the indictment (A.A. 1931). If the jury found that petitioner had received taxable income which he did not report on his annual income tax returns for the years 1956 through 1960, it made no difference whether the income had been lawfully or unlawfully received (A.A. 1948). The court stressed that petitioner could not be found guilty because he committed some act of misconduct not charged (A.A. 1952). The jury began its deliberations on the evening of January 17, 1964, and returned a verdict of guilty on all counts on the afternoon of January 21 (A.A. 1970–1978).

3. On direct appeal to the Seventh Circuit petitioner continued to claim that the admission into evidence of his wagering tax forms was prejudicial error. However, he did not renew that contention in his petition for a writ of certiorari seeking review

of the court of appeals' affirmance of his conviction (No. 216, 1965 Term). Petitioner began serving his sentence in December 1965, after certiorari was denied by this Court.

On January 29, 1968, this Court announced its decisions in *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62, holding that one charged with violating the federal wagering tax laws could assert the privilege against self-incrimination as a complete defense to prosecution for noncompliance. Relying upon these decisions, petitioner filed a motion to vacate his sentence, pursuant to 28 U.S.C. 2255, in February 1968, claiming that the trial court had erred in admitting his wagering tax forms into evidence because he had filed them under compulsion of a legal command which the government could not properly impose. The lower courts denied relief, largely upon the ground that petitioner's failure to assert this claim at trial constituted a waiver, and that petitioner's attempt to avoid the consequence of waiver by seeking to rely on the holdings in *Marchetti* and *Grosso* was inappropriate, since those decisions should not be applied retroactively.

SUMMARY OF ARGUMENT

I

The wagering tax forms, while relevant, were not a vital and indispensable part of the government's case against petitioner for income tax evasion. Other clearly admissible evidence disclosed that during the taxable years in question petitioner had engaged in sev-

eral occupations, including gambling, all of which served as likely sources from which undisclosed taxable income could arise. This is all that the government was required to show under the net worth method of proof. The sole purpose of introducing the wagering tax forms was to strengthen the proof of gambling as a likely source. The evidence the forms provided could not have been the principal reason that the jury found petitioner guilty of income tax evasion. Had the issue now presented regarding the admission of the forms in evidence arisen on direct appeal, the court of appeals would have been justified in finding any error in admission to have been non-prejudicial. In these circumstances, the same question raised on collateral attack for the first time should not be deemed cognizable, even under the standards enunciated in *Kaufman* v. *United States,* 394 U.S. 217.

II

Even if petitioner's claim is cognizable, he is not entitled to relief on the basis of this Court's decisions in *Marchetti* v. *United States* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62. Those cases held only that gamblers charged with failing to comply with the registration and payment requirements of the federal wagering tax laws could assert the privilege against self-incrimination as a complete defense to criminal prosecution for non-compliance. That was so, the Court concluded, because those laws required that information which could prove a significant link in a chain of evidence tending to establish violations of other State and

federal laws relating to gambling be provided to the government. Nothing in *Marchetti-Grosso* extinguishes civil liability for non-compliance with the wagering tax laws. Nor should those cases preclude the admission of wagering tax forms into evidence at a trial for income tax evasion. Any risk of self-incrimination in such a context from a requirement to file the forms is imaginary and insubstantial. A subsequent and essentially unrelated criminal act—violation of the income tax laws—is necessary before such forms could even be relevant in the income tax context. Nor should the forms be excluded simply because they had initially been filed under the generalized compulsion inherent in any taxing scheme.

III

At all events, the rationale of *Marchetti-Grosso* should not be applied retroactively so as to upset convictions which had become final prior to the date of those decisions. This should certainly be so as to convictions, such as the one here, which are for violations outside the wagering tax context. This conclusion follows from an application of the three criteria established by the Court for determining retroactivity. The rule of *Marchetti-Grosso,* grounded as it is on the Fifth Amendment's privilege against self-incrimination, falls within a category of cases involving protection of the right of privacy, a value which, while important, does not furnish a basis for retroactive application of decisions relating to it. Law enforcement authorities manifestly were justified in believing, prior to *Marchetti-Grosso,* that a defense of self-incrimina-

tion would not prevail. Finally, retroactive application of *Marchetti-Grosso* would have a substantial impact on the administration of justice.

ARGUMENT

I. SINCE THE WAGERING TAX FORMS CLAIMED TO HAVE BEEN ERRONEOUSLY ADMITTED WERE NOT OF GREAT SIGNIFICANCE IN PROVING PETITIONER'S GUILT, ALLEGED ERROR IN THEIR ADMISSION AT TRIAL SHOULD NOT BE DEEMED COGNIZABLE UNDER 28 U.S.C. 2255

As an initial matter, the instant case presents a problem of more general importance than merely the question of the scope and retroactivity of the *Marchetti-Grosso* decisions. That problem is the extent to which a conviction which has been fully reviewed on appeal is subject to collateral attack because a particular item of evidence, whose introduction was not objected to on constitutional grounds at trial or on appeal, is subsequently challenged as having been obtained in violation of constitutional rights. In *Kaufman* v. *United States*, 394 U.S. 217, and *Townsend* v. *Sain*, 372 U.S. 293, this Court held that claims of constitutional error in the admission of evidence may be challenged in collateral proceedings, despite the failure to raise the issue at trial or on appeal. Because of those rulings, we suggest, it is important that this Court provide guidelines for lower federal courts regarding what claims of error in the admission of evidence should, and what need not, be considered upon collateral attack of a criminal conviction.

The instant case is an excellent illustration, we submit, of the anomaly which can result from a lit-

eral and uncritical application of the *Kaufman* doctrine to any evidence introduced at a federal criminal trial. The wagering tax returns whose admissibility is challenged in this proceeding, while clearly relevant as the government has consistently maintained, were not, in view of all the other evidence showing income tax evasion, of great significance to the government's case against petitioner. Had a constitutional challenge been raised at trial,[7] the government might very well have decided to forego introducing them into evidence. Alternatively, had the constitutional issue been raised on direct appeal, the court of appeals would have been justified in finding the error harmless beyond a reasonable doubt under the standard of *Chapman* v. *California,* 386 U.S. 18, as explicated in *Harrington* v. *California,* 395 U.S. 250. If admissibility of these items of evidence would not necessarily have constituted error requiring reversal on direct appeal, their admission at trial should not, we submit, constitute a basis for collateral attack after the conviction has become final.

At petitioner's trial the crucial issue was whether assets purchased with funds allegedly traced to petitioner belonged to him or to the putative purchasers. Some 85 government witnesses, including relatives and friends of petitioner, gave testimony regarding numerous specific investments during and before the years covered in the indictment. From these investments substantial unreported (and clearly taxable)

[7] Petitioner's objection at trial to the admission of the wagering tax forms was founded solely on the ground that they were inflammatory (see Pet. Br. 8).

income was derived, in the form of rental receipts, cash dividends and the like. This evidence alone satisfied the requirement that the government in net worth cases show some likely source from which the currently taxable income arose. *Holland* v. *United States*, 348 U.S. 121, 138; *United States* v. *Sclafani*, 265 F. 2d 408 (C.A. 2), certiorari denied, 360 U.S. 918; cf. *United States* v. *Massei*, 355 U.S. 595; *Kramer* v. *Commissioner*, 389 F. 2d 236 (C.A. 7). Beyond this, the government established another possible source when it introduced into evidence petitioner's federal income tax returns for the years covered by the prosecution. On these returns petitioner had identified himself as a policy operator. Cf. *United States* v. *Sullivan*, 274 U.S. 259, 263. This clearly admissible evidence that petitioner was engaged in the business of gambling, coupled with his admission to that effect to an agent of the Internal Revenue Service, provided ample proof of gambling as another likely source of income. The wagering tax forms may have strengthened the proof in this area but they did not, as petitioner maintains, constitute a vital and indispensable portion of the case against him (Pet. Br. 17).[8] Like

[8] Petitioner's intimation that the jury, after deliberating for several days, might well have decided to convict him because of the presence of his 60 wagering tax forms (Pet. Br. 28) is, we believe, effectively refuted by reference to the court's instructions on the limited consideration to be given to the evidence of gambling (see *supra*, p. 11). Moreover, the jury's request to the court after some deliberation for a clarifying instruction—on whether it was necessary to prove the *exact* amount of unreported income as alleged in the indictment—provides some indication of the particular matter upon which they were deliberating.

the evidence introduced in *Harrington* v. *California, supra,* the evidence as to a likely source of petitioner's unreported income was "so overwhelming" (*id.* at 254) even without the wagering tax forms that his conviction should be upheld unless the Court were to determine that any departure from constitutional procedures requires reversal. This it refused to do in *Harrington.*

The rule that admissibility of evidence may be challenged on constitutional grounds despite the failure to raise the issue at trial or on appeal was initially adopted with respect to confessions, found to have been coerced, in which an accused admitted his guilt of a serious crime. *Fay* v. *Noia,* 372 U.S. 391; *Townsend* v. *Sain,* 372 U.S. 293. The impact of that type of confession on the ultimate judgment of guilt was so self-evident that the Court had no occasion to consider the extent to which the availability of collateral relief should depend on the relationship of the challenged evidence to the whole proof at the trial. Moreover, the normal impact of an actual confession is decisive and the repugnance of coerced confessions is so substantial that, even on direct review, courts have not undertaken to measure degrees of prejudice. *E.g., Payne* v. *Arkansas,* 356 U.S. 560, 568; *Blackburn* v. *Alabama,* 361 U.S. 199, 205–208; *Haynes* v. *Washington,* 373 U.S. 503, 517–520; *Jackson* v. *Denno,* 378 U.S. 368, 376.

Petitioner strains to bring this case within those rulings by arguing that his wagering tax forms, filed under the compulsion of a federal statute, in effect constituted a coerced confession because, when he filed

them, he did not intelligently and knowingly waive his privilege against self-incrimination. As the court of appeals correctly pointed out, however, "the compulsion which turns interrogation into a violation of the privilege against self-incrimination is not the same as the coercion and intimidation which make a confession involuntary and a denial of Due Process" (A. 53). There was here neither the physical or psychological intimidation nor the trickery involved in the typical coerced confession cases. Indeed, as the court below also noted (A. 50), the decisions in *United States* v. *Kahriger,* 345 U.S. 22, and *Lewis* v. *United States,* 348 U.S. 419, did not directly involve the wagering excise tax provision, and thus did not necessarily preclude, by their holdings, the opportunity to challenge the requirement of filing wagering tax returns, as was done in *Grosso.* Even if it be assumed that, had petitioner gone to trial after the effective date of *Marchetti-Grosso* he could have prevailed in his attempt to exclude from evidence his wagering tax forms filed before those decisions by asserting that he had not knowingly waived the privilege, it is nevertheless clear that such returns cannot in any realistic sense be deemed to be the equivalent of a coerced confession where the will of the confessor in custody is overborne by force, intimidation or deceit. Unlike the situation in the typical coerced confession cases, therefore, there is no reason here to fail to take into account the relationship of the challenged evidence to the case as a whole. And since, as we have shown, the admission into evidence of the wagering tax forms could prop-

erly have been deemed harmless error on direct appeal, it should not be held to furnish the basis for a collateral attack under 28 U.S.C. 2255.

We suggest that it would be appropriate in this case for the Court to make it clear that, with respect to a claim that inadmissible evidence was introduced at trial (except a claim as to a coerced confession obtained from a defendant in custody), the moving party, if he failed to raise the issue at trial or on appeal, must make an affirmative showing that the challenged evidence played a significant part in bringing about his conviction. At the very least, if it is determined that admission of challenged evidence could properly have been deemed harmless error on appeal, under the standard of *Chapman* v. *California,* 386 U.S. 18, as clarified in *Harrington* v. *California,* 395 U.S. 250, a district court should be permitted to refuse to entertain a challenge to such evidence on collateral attack. In *Kaufman* v. *United States,* 394 U.S. 217, where there was an objection at trial although no pre-trial motion to suppress, the Court found, contrary to the government's position, that the challenged evidence did have a significant bearing on the defense of insanity. We do not read *Kaufman* as cutting back on the *Chapman* rule which the Court subsequently reaffirmed in *Harrington* v. *California, supra.* To confer upon a defendant the right to challenge the admissibility of evidence collaterally regardless of its significance at his trial would needlessly disrupt the orderly processes of justice. Defendants should be encouraged to challenge evidence before it is introduced; they should not be given an incentive to

attack in a proceeding under 28 U.S.C. 2255 an item of evidence the admission of which would not have required reversal had objection thereto been taken on direct appeal. As this Court recently stated in *Bryson* v. *United States,* No. 35, this Term, decided December 8, 1969, "a substantive defense which is not legally relevant on direct review becomes no more relevant because asserted on collateral review" (slip op., p. 9).[9]

II. THE RATIONALE OF *MARCHETTI-GROSSO* DOES NOT PRECLUDE THE ADMISSION INTO EVIDENCE OF WAGERING TAX FORMS IN A PROSECUTION FOR INCOME TAX EVASION

Even if this Court determines that petitioner's claim is cognizable under 28 U.S.C. 2255, the decision

[9] One further consideration might be mentioned at this point. In *United States* v. *Covington,* 395 U.S. 57, the Court explained that a claim of self-incrimination is a valid defense to a prosecution under 26 U.S.C. 4744 "unless the plea is untimely, the defendant confronted no substantial risk of self-incrimination, or the privilege has been waived." This formulation suggests that untimeliness is a factor separate and apart from deliberate "waiver" of a known right. A variety of factors indicate that petitioner's assertion of the privilege here should be regarded as untimely. The claim was raised for the first time years after the wagering tax forms had been filed; petitioner was not prosecuted for failing to comply with the wagering tax laws as were the defendants in *Marchetti* and *Grosso;* nor was he prosecuted for the illegal gambling activities which the returns declared, the type of disclosure which formed the basis of the *Marchetti-Grosso* holdings; he made no challenge to the admissibility of the forms on constitutional grounds at his trial for income tax evasion; and the forms would have been just as relevant to that proceeding if gambling had been a lawful activity. These factors were taken into account, it should be noted, by both of the lower courts in determining to reject petitioner's application for collateral relief (see A. 36–38, 49-50).

below should still be affirmed. There is, as we have shown (*supra*, pp. 18–20), no merit to petitioner's contention that this is a coerced confession case. Nor is there any basis for his claim, grounded on *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, that the admission into evidence against him of the wagering tax forms, in his prosecution for income tax evasion, violated his privilege against self-incrimination.

In *Marchetti* and *Grosso* this Court held that a person charged with failure to register and pay the occupational or excise tax on wagering could assert, as a complete defense to prosecution for such non-compliance, that to comply would violate his privilege against self-incrimination. It did so because such a person is "confronted by a comprehensive system of federal and state prohibitions against wagering activities," and is "required, on pain of criminal prosecution, to provide information which he might reasonably suppose would be available to prosecuting authorities, and which would surely prove a significant 'link in a chain' of evidence tending to establish his guilt" (*Marchetti* v. *United States, supra*, 390 U.S. at 48). *Marchetti* and *Grosso* do not, however, support petitioner's belated assertion of the privilege in this collateral proceeding challenging his conviction for income tax evasion.

Under Treasury Regulation 44.6011(a)–1(a), those persons liable for the excise tax on wagers imposed by 26 U.S.C. 4401(a) must file wagering tax forms monthly. The form required to be filed in reporting each month's wagers—Form 730—must be filed by the

last day of the next succeeding month. Treasury Regulation 44.6071–1(a). Since the wagering tax forms filed for the months of any calendar year covered by the indictment were required to be filed well in advance of petitioner's income tax return for that year,[10] his obligation to file the forms created no "real and appreciable" hazard that he would incriminate himself for income tax evasion. *Regina* v. *Boyes,* 1 B. & S. [Q.B., 1861] 311, 330; *Brown* v. *Walker,* 161 U.S. 591, 599–600; *Rogers* v. *United States,* 340 U.S. 367, 374. These forms, showing gross receipts from gambling, could not of themselves have constituted an admission of any income tax offense. Nor did petitioner's disclosure of the fact that he was in the gambling business have the effect of incriminating him insofar as his income tax liability was concerned. It was only petitioner's *subsequent* acts of omitting substantial parts of his income from his income tax returns that made the *previously* filed wagering tax forms at all relevant to this prosecution. At the time the forms were filed, it could not be said that they "would surely prove a significant 'link in the chain' of evidence tending to establish his guilt" of the crime for which he has been convicted (*Marchetti* v. *United States, supra,* 390 U.S. at 48). Indeed, any such risk can only be described as "imaginary and insubstantial" (*Regina* v. *Boyes, supra; Brown* v. *Walker, supra; Rogers* v. *United States, supra;* cf. *Minor* v. *United States,* No. 189, this Term, decided December 8, 1969.

In *Marchetti* and *Grosso* the Court made it clear

[10] Under 26 U.S.C. 6072(a), petitioner's income tax return for each calendar year was due on the succeeding April 15.

that it was not holding that the imposition of the occupational and excise taxes on wagering was constitutionally prohibited, but only that the privilege provided a complete defense in a prosecution for failure to comply with the related filing and payment requirements of the statute. Thus, in *Marchetti* the Court carefully circumscribed its holding as follows (390 U.S. at 61):

> * * * we do not hold that these wagering tax provisions are as such constitutionally impermissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with these requirements. * * *

It similarly limited its holding in *Grosso,* in even more explicit language (390 U.S. at 69–70, n. 7).

Although the Court did not decide the question in *Marchetti* and *Grosso,* the introduction of wagering tax forms against a gambler in a prosecution for violation of a statute that is part of the "comprehensive system of federal and state prohibitions against wagering activities" (*Marchetti* v. *United States, supra,* 390 U.S. at 48) presumably would be barred by the privilege against self-incrimination. See *United States* v. *Lookretis,* 398 F. 2d 64 (C.A. 7). This result would seem to follow because such a statute is one of those that led the Court to conclude that the privilege could be asserted as a defense to the charge of failing to pay the occupational or excise tax on gambling, since otherwise incrimination thereunder would potentially result. But the federal income tax laws are not part of that com-

prehensive statutory system.[11] They are neutral on their face, insofar as the legality of a taxpayer's activities is concerned, and apply to all persons, not just a group inherently suspect of criminality. And the income tax is imposed—at the same rate—on income from all activities, whether they be lawful or unlawful. See *United States* v. *Sullivan,* 274 U.S. 259; *Albertson* v. *SACB,* 382 U.S. 70, 79. In light of these considerations, allowing the privilege to be asserted here would extend *Marchetti-Grosso* significantly beyond the premises upon which the holdings in those cases are based.

Even if the penumbra of *Marchetti-Grosso* extends beyond prosecutions for violation of the wagering tax laws themselves and State statutes comprising the comprehensive prohibitory system relating to gambling described by the Court in those cases, it surely does not cover a prosecution for wilfully filing false income tax returns. This much, we submit, is established by the Court's holding earlier this Term in *United States* v. *Knox,* No. 17, decided December 8, 1969. There the Court demonstrated that it meant precisely what it said in *Marchetti* and *Grosso*—that those decisions do not bar the use in all prosecutions of wagering tax forms filed before the date thereof. It upheld the indictment there, over a claim of privilege, for wilfully filing false wagering tax forms in violation of 18 U.S.C. 1001. Here, as in *Knox* but unlike

[11] In his opinion for the Court in *Marchetti*, Mr. Justice Harlan enumerated the types of gambling and gambling-related offenses with respect to which wagering tax forms could prove incriminatory (see 390 U.S. at 52–53).

in *Marchetti-Grosso,* wagering tax forms were in fact filed. The issue in *Knox* was whether *Marchetti-Grosso* excused falsification in filing those forms. The analogous question here is whether *Marchetti-Grosso* requires the exclusion of such forms from evidence in a prosecution for filing false income tax returns. The result in *Knox* argues strongly for a negative answer; indeed, the relevance of the privilege is even more attenuated here than in *Knox.*

If the privilege against self-incrimination is not an absolute defense in a prosecution for wilfully filing false wagering tax forms—which this Court subsequently held need not have been filed—*a fortiori* the privilege is no defense in a prosecution for wilfully filing false income tax returns which, of course, must be filed regardless of the illegal nature of the taxpayer's income-producing activities. *United States* v. *Sullivan, supra.* It is no answer to suggest, as petitioner does in reliance on *Knox* (slip op., p. 5), that the Fifth Amendment is offended here because he "succumbed to the statutory compulsion by furnishing the requested incriminatory information" (Pet. Br. 19). This argument is without merit because the information furnished by petitioner was not incriminatory as to the offense for which he was convicted. The forms he filed were not even relevant until he committed, at a later date, the distinct offense of income tax evasion—for which he was here charged, tried and convicted. In the circumstances of this case, then, petitioner's claim of the privilege is "extreme" and "extravagant" (*United States* v. *Sullivan, supra,* 274 U.S. at 263), and should be rejected.

III. THE RATIONALE OF *MARCHETTI-GROSSO* SHOULD NOT BE APPLIED RETROACTIVELY TO CONVICTIONS WHICH HAD BECOME FINAL PRIOR TO THE DATE OF THOSE DECISIONS

If the issue should be reached, it is our position that *Marchetti* and *Grosso* should be given prospective application only, at least in cases where the challenge to evidence based on those decisions is made only collaterally. This is particularly so, we submit, in cases such as this one, involving as it does a conviction for a violation wholly outside the wagering tax—and indeed gambling—context.

As this Court pointed out in the first case on the subject, "the Constitution neither prohibits nor requires [that] retrospective effect" be given to decisions fashioning new or changed rules (*Linkletter* v. *Walker,* 381 U.S. 618, 629). Over the past few years the criteria for determining retroactivity have been clarified in various of this Court's decisions, and were most recently enunciated in *Halliday* v. *United States,* 394 U.S. 831, 832. Those criteria are (1) the *purpose* of the newly fashioned rule; (2) the extent of *reliance* upon the prior rule; and (3) the *effect* that retroactive application would have upon the administration of justice. See also *Stovall* v. *Denno,* 388 U.S. 293, 297; *Desist* v. *United States,* 394 U.S. 244, 249. An overriding concern has been to ensure the fairness of the fact-finding or guilt-determining process (*ibid.*). Retroactivity has not been made dependent upon the value of the interest sought to be protected by the new rule, however,

and a right is not disparaged by the Court's determination not to give it retrospective application. *Johnson* v. *New Jersey*, 384 U.S. 719, 727–728.

It does not demean the importance of the privilege against self-incrimination to observe that its purpose does not relate to protecting the innocent from conviction, but rather to preserving "the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load' " (*Tehan* v. *Shott*, 382 U.S. 406, 415; *Miranda* v. *Arizona*, 384 U.S. 436, 460). In contrast to constitutional rules which have been given retrospective application because they touched upon the truth-determining process or involved procedural safeguards designed to ensure against convicting the innocent (*e.g.*, *Roberts* v. *Russell*, 392 U.S. 293; *Jackson* v. *Denno*, 378 U.S. 368; *Gideon* v. *Wainwright*, 372 U.S. 335), the Fifth Amendment privilege stands as a protection of quite different values—"values reflecting the concern of our society for the right of each individual to be let alone" (*Tehan* v. *Shott*, *supra*, 382 U.S. at 416).[12] While these latter values are indeed important, from the standpoint of determining retroactivity they do not furnish a basis for other than prospective application of constitutional decisions in the Fifth Amendment area. This is particularly so where, as here, the other evidence of guilt is ample and the truthfulness of the matters disclosed on the wagering tax forms was never questioned. In short, petitioner's concern is not the unreliability or untrustworthiness of

[12] See also *Arsenault* v. *Massachusetts*, 393 U.S. 5, 6 (footnote).

the statements made in the forms, but simply the threat of what else might have been revealed by admission of the statements in evidence.

Since the first criterion overwhelmingly favors non-retroactivity, the effect of the other factors need not undergo lengthy examination. See *Desist* v. *United States,* 394 U.S. 244, 251. But even if the purpose of the rule in question did not clearly militate against retrospective application, the factors of the extent of reliance and the consequent burden on the administration of justice provide additional support for a holding of non-retroactivity. The second criterion, the extent of reliance upon the prior standard, must take into consideration the fact that more than 15 years ago this Court concluded in *United States* v. *Kahriger,* 345 U.S. 22, that the Fifth Amendment privilege against self-incrimination did not constitute a defense to prosecutions based upon wilful failure to register and pay the special wagering occupational tax as required by 26 U.S.C. 4411 and 4412. That holding was reaffirmed two years later in *Lewis* v. *United States,* 348 U.S. 419. Although these decisions did not deal explicitly with the wagering excise tax, the Court recognized in *Grosso* v. *United States,* 390 U.S. 62, 70, that the self-incrimination questions presented by the separate taxes were related. There was thus no reason why law enforcement authorities should have doubted their right to use wagering tax forms filed without protest or made any attempt to relitigate the consti-

tutionality of the statute, particularly in a prosecution for income tax evasion.

The third criterion, the effect of retroactive application of the new standard upon the administration of justice, also argues against applying *Marchetti* and *Grosso* retroactively. It is true that relatively few individuals now serving prison sentences have been convicted of wagering tax offenses, since the average prison sentence for such violations has been about one year, and prosecutions have virtually halted since January 29, 1968—the date *Marchetti* and *Grosso* were decided. See *United States* v. *Lucia*, 416 F. 2d 920, 925 (C.A. 5). However, the completion of a sentence does not necessarily render moot an attack upon a conviction. *E.g.*, *Carafas* v. *LaVallee*, 391 U.S. 234, 237–238; *Sibron* v. *New York*, 392 U.S. 40, 55–58. Prior to 1968, there was a sizable number of individuals, at least in the thousands, who had purchased wagering tax stamps,[13] and there were numerous prosecutions for failing to file wagering tax forms. There is little doubt that the courts would

[13] The annual reports of the Commissioner of Internal Revenue list the following number of wagering occupational tax stamps issued for the following fiscal years ended June 30:

Year	Number of stamps
1963	7,450
1964	7,465
1965	7,284
1966	6,155
1967	5,917
1968	5,089
1969	3,527

be compelled to entertain a substantial number of collateral motions to vacate sentences imposed on convictions for violating the wagering tax laws if *Marchetti-Grosso* were accorded wholly retroactive application. *Graham* v. *United States,* 407 F. 2d 1313 (C.A. 6), petition for certiorari pending, No. 294 Misc., this Term.

Moreover, there is no available record of how many gamblers like petitioner were convicted of income tax evasion in trials where forms filed by them pursuant to the federal wagering tax laws were introduced, nor of the sentences such individuals received. In all likelihood, a significant number of such persons exist, since gamblers have historically been deemed a suspicious class, capable of concealing revenue with relative ease because of the nature of their activities. See *United States* v. *Costello,* 221 F. 2d 668, 672 (C.A. 2) (L. Hand, J.), affirmed on other grounds, 350 U.S. 359. Retroactive application of *Marchetti-Grosso* would require individual consideration of each claim, and in instances where the accused had not asserted the privilege at trial, a hearing to determine whether there had been an intelligent waiver. See *Masterson* v. *United States,* 293 F. Supp. 787 (D. Del.). The error complained of, particularly in the context of this case, is not so fundamental that it should be allowed, at this late date, to disrupt the ongoing administration of our criminal laws and require the upsetting of all final convictions based upon it.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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